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HAROLD B. WILE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 164 / 2

HY GOLDBAUM, GEORGE CAPRI AND EDWARD COOKE,

Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

IRVIN GOLDSTEIN,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 164

HY GOLDBAUM, GEORGE CAPRI AND EDWARD COOKE,

Petitioners,

vs.

UNITED STATES OF AMERICA

MOTION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioners herein and respectfully pray that this Honorable Court reconsider its order of October 13, 1953, denying the petitioner's application for writ of certiorari, and, in lieu thereof, grant the said application for writ of certiorari, and for grounds therefor say as follows:

1. The questions presented in petitioner's application are of great importance in the administration of the criminal law of the United States.

2. There is a serious conflict between different Circuit Courts of Appeal as to the matters involved in Question No. 1.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 164

HY GOLDBAUM, GEORGE CAPRI AND EDWARD COOKE,

Petitioners,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Because of the importance of the questions involved in this petition for writ of certiorari, petitioners respectfully submit this additional brief in support of their application for reconsideration of this Honorable Court's order denying said petition.

The contention of the United States is that since petitioners were presumed to have reported income on a cash basis, therefore the determination of *actual* income by the "net worth" method justifies the disregard of accounts payable and receivable known to the prosecution.

The "net worth" method consists simply in calculating the increase in the net worth of the taxpayer for the tax years in question and charging such increased net worth

as actual income. Accounting methods have no sanctity in themselves, they are only the means of establishing actual income.

The United States holds for the theory that "accounts receivable and payable should be ignored in a net worth computation for a cash basis tax-payer." (Brief 14, 15). The incorrectness of such a view is exposed by the simplest of illustrations. A cash basis tax-payer purchases an automobile for two thousand dollars, paying five hundred dollars in cash and leaving an unpaid balance due of fifteen hundred dollars. Has this tax-payer's net worth increased two thousand dollars? Obviously not, but such is the position of the United States in this proceeding. And if this same cash basis tax-payer were prosecuted for tax evasion, with all of the facts known to the revenue agents computing the tax-payer's net worth, it is not permissible for the prosecution to offer proof of the automobile as an asset worth two thousand dollars, ignore the debt, and so lift from the prosecution the duty to establish that the income reported in the return filed was incorrect and place upon the tax-payer the burden of proving that the reported income was correct.

Leeby v. *United States*, 192 F. 2d 331 (CCA 8) cited by respondent in support of its contention, and *Gariepy* v. *United States*, 189 F. 2d 459 (CCA 6), upon which Leeby so greatly relies, are in addition to those cases cited by petitioners (Pet. Br. 9, 10) and accentuate the existing conflict between the Fourth, Sixth, Eighth, Ninth and Tenth Circuits on the one hand, and the Third, Fifth and Seventh Circuits on the other. Leeby holds, (page 334) that "all that was necessary to show was that there was omitted from the reported income a substantial amount." Not that the "substantial amount" was taxable income, not that it represented a real asset, but merely that the prosecution's

burden was the establishment of the omission of a "substantial amount". The *Gariepy* case, pages 462, 463, concedes the existence of the conflict in decisions of the circuits.

See also *Kirsch* v. *United States,* 174 F. 2d 595 (CCA 8) and *Gleckman* v. *United States,* 80 F. 2d 399 (CCA 8).

We are frequently warned against "subtle encroachment upon constitutional privileges" but what appears to be a definite trend in tax evasion cases toward relieving the prosecution of the burden of proving the defendant's guilt and requiring the defendant to prove his innocence would seem to be in obvious violation of the rules relating to presumption of innocence and self-incrimination.

Respectfully submitted,

IRVIN GOLDSTEIN,
Counsel for Petitioners.